TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, PETITIONER,

vs.

OREGON STEVEDORING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1962
CERTIORARI GRANTED APRIL 16, 1962

876

No. 17616

United States
Court of Appeals
For the Ninth Circuit

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

Appellant,

vs.

OREGON STEVEDORING COMPANY, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 1/22/62—Printed 2/13/62

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

WOOD, WOOD, TATUM, MOSSER & BROOKE;
ERSKINE B. WOOD,
1310 Yeon Building, Portland 4, Oregon,
For Appellant.

GRAY, FREDRICKSON & HEATH;
FLOYD A. FREDRICKSON,
1021 Equitable Building, Portland 4, Oregon,
For Appellee.

In the United States District Court
For the District of Oregon

No. Civ. 60-375

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

Libelant,

vs.

OREGON STEVEDORING COMPANY, INC.,

Respondent.

LIBEL

To the Honorable Judges of the above-entitled Court in admiralty sitting:

The libelant, in a cause of contract, civil and maritime, brings this libel against the respondent and thereupon alleges as follows:

I.

Libelant is and at all times mentioned was a business concern organized and existing under the laws of Italy, and engaged in the business of operating ocean-going steamships. The libelant is, and at all times mentioned, was the owner and operator of the motor ship Antonio Pacinotti.

II.

Respondent is, and at all times mentioned was, an Oregon corporation engaged in the business of an independent contracting stevedore, and maintained an office in Portland, Oregon.

III.

At all times pertinent herein, there existed a contract between libelant and respondent, whereby respondent undertook to perform the stevedore work on libelant's vessel while in Columbia River ports. Pursuant to said stevedoring contract, the respondent, as master stevedore, conducted the stevedoring operations on the M. S. Antonio Pacinotti on or about November 19, 1958, while said vessel was in the port of Portland, Oregon, and in so doing employed one William Griffiths as a longshoreman. At said time and place respondent supplied a hatch tent, together with appurtenant tie down ropes for use by the longshoremen aboard the vessel.

IV.

On or about November 19, 1958, while respondent was conducting stevedoring operations aboard said vessel, said William Griffiths, in the course of his employment, pulled on one of the tie-down ropes on said hatch tent, which rope parted, resulting in said William Griffiths' falling to the deck of the vessel and resulting in personal injuries to him. Because of these, he brought an action at law against the libelant in the Circuit Court of the State of Oregon for the County of Multnomah bearing Clerk's number 261-553.

V.

Libelant gave formal notice to respondent to come in and defend said action and to assume re-

sponsibility therefor. A copy of said notice is attached hereto, marked Exhibit A, and by this reference made a part hereof. Respondent failed and refused to take any action whatsoever with respect thereto.

VI.

The aforesaid action proceeded to trial and the jury returned a verdict in favor of Griffiths, and a judgment was entered therein against libelant, for the sum of $5,891.03, together with costs and disbursements taxed at $62.49, and with interest on said judgment from the date thereof until paid. Libelant satisfied said judgment on the 12th day of September, 1960, by the payment of $5,953.52. Copies of said judgment and satisfaction of judgment, marked Exhibits B & C respectively, are attached hereto and by this reference made a part hereof.

VII.

The respondent breached its stevedoring contract with libelant to perform the work in a proper, safe and workmanlike manner, and supplied a tent rope which failed in the course of being used for the purpose for which it was supplied.

VIII.

As a result of said breach and negligent performance, said Griffiths was injured and libelant, by reason of the ensuing action at law and judgment and the necessary payment thereof has been damaged in the sum of $5,953.52 and in the further sum

of $1,250 attorneys' fees and $295.80 costs and expenses necessarily incurred in the defense of the aforesaid action. Respondent is liable to indemnify libelant in full for said loss and damage in the sum of $7,499.32.

IX.

All and singular, the premises are true and within the Admiralty and Maritime jurisdiction of the United States and this Honorable Court.

Wherefore, libelant prays that process may issue against the said respondent and that it be cited to appear and answer the allegations of this libel and that the libelant may be decreed to have and recover from and against respondent the aforesaid damages in the total sum of $7,499.32, with interest thereon at the legal rate from and after September 12, 1960, and for such other and further relief as to the Court may seem just and in accordance with the Admiralty practice.

WOOD, MATTHIESSEN,
WOOD & TATUM,

/s/ JOHN C. HOLDEN,
Proctors for Libelant.

EXHIBIT A

March 2, 1960

Certified Mail

William Griffith v. Soc. per Azioni di Nav. Italia, Genoa, No. 261-553 in The Circuit Court of the State of Oregon for the County of Multnomah.

Oregon Stevedoring Company,
3630 N. W. Front,
Portland, Oregon.

Gentlemen:

We refer to the above matter. We represent Italia Societa Per Azione Di Navigazione (Italian Line), owner of the M/V Antonio Pacinotti. On or about 19 November 1958, one of the longshoremen in your employ, Mr. William Griffith, was injured aboard the M/V Antonio Pacinotti while the vessel was moored at Terminal 1, Portland, Oregon.

Mr. Griffith alleges he sustained injuries when he was heaving on a hatch tent rope which parted, causing him to fall to the deck.

At the time and place of this accident Oregon Stevedoring Company was under contract with the vessel's owner to perform the stevedoring work aboard the vessel. Oregon Stevedoring Company owned the tent rope in question and controlled the longshore activities aboard ship.

William Griffith filed a complaint in the Multnomah County Circuit Court. It has been superseded

by an amended complaint, a copy of which is enclosed.

From our investigation of this accident, it appears that Oregon Stevedoring Company is responsible for William Griffith's injuries. Therefore, on behalf of the M/V Antonio Pacinotti and her owners, we hereby tender the defense of said action to you and give you notice to so defend. We further notify you that if the vessel Antonio Pacinotti and/or her owner are held liable to William Griffith in said action Italian Line will hold you liable and seek full indemnity from you for any and all losses, damages and expenses incurred by the vessel and her owner in said action and for any judgment suffered by it and for all costs and expenses incurred in investigating, preparing and defending said action, including reasonable attorney's fees.

Your failure to answer this letter within ten days of receipt thereof will be deemed a rejection of this notice and tender.

Very truly yours,

WOOD, MATTHIESSEN,
WOOD & TATUM,

By JOHN G. HOLDEN.

JGM:cma

Encl.

EXHIBIT B

For the County of Multnomah

No. 261-553

WILLIAM GRIFFITHS,

Plaintiff,

vs.

SOC. per AZIONI di NAV. ITALIA, GENOA, a Corporation, Company or Concern,

Defendant.

JUDGMENT ORDER

The above-entitled cause having come on regularly for trial by jury before the Honorable Judge William J. Crawford, Judge pro-tem, of the above-entitled Court, plaintiff appearing in person and Donald R. Wilson, of counsel and the defendant appearing by John Holden of counsel, for trial June 29, 1960, the jury having been selected, empaneled and sworn, opening statements having been made by counsel, evidence having been received on behalf of the respective partis, arguments having been addressed to the jury by counsel, the Court having instructed the jury upon the law, and the jury thereupon having retired for deliberation, did deliberate and return its verdict on July 1, 1960, in words and figures as follows, omitting the title of the Court and cause, to wit:

"We, the Jury, being duly empaneled and sworn to well and truly try the above-entitled

cause, do find our verdict in favor of the plaintiff, William Griffiths, and against the defendant, Soc. per Azioni di Nav. Italia, Genoa, a corporation, company or concern, and assess plaintiff's special damages in the sum of $891.03 and general damages in the sum of $5,000.00.

Dated this 1st day of July, 1960.

/s/ JAMES SCHMITT,
Foreman."

and said verdict having been received and entered and accepted by the Court and the Court being fully advised in the premises now, therefore, based upon said verdict.

It Is Hereby Ordered and Adjudged that plaintiff, William Griffiths, have of and recover from the said defendant, Soc. per Azioni di Nav. Italia, Genoa, a corporation, company or concern, the sum of Five Thousand Eight Hundred Ninety-One Dollars and Three Cents ($5,891.03) in lawful money of the United States of America, together with his costs and disbursements taxed and allowed herein in the sum of $62.49, the aggregate of which is to bear interest at the rate of six per cent (6%) per annum from the date of entry hereto until paid, and that execution issue therefore.

Dated this 8th day of July, 1960.

/s/ WILLIAM J. CRAWFORD,
Judge.

EXHIBIT C

In the Circuit Court of the State of Oregon
For the County of Multnomah

No. 261-553

WILLIAM GRIFFITH,

Plaintiff,

vs.

SOC. per AZIONI di NAV. ITALIA, GENOA, a Corporation, Company or Concern,

Defendant.

SATISFACTION OF JUDGMENT

For and in consideration of the sum of Five Thousand Nine Hundred Fifty-Three and 52/100 Dollars ($5,953.52), lawful money of the United States paid to me by the above-named defendant, receipt of which is hereby acknowledged, full satisfaction is hereby acknowledged of that certain judgment rendered in the said Multnomah County Circuit Court in the action, on the 2nd day of July, 1960, in favor of William Griffith, plaintiff, and against Soc. per Azioni di Nav. Italia, Genoa, in case number 261-553, for the sum of Five Thousand Eight Hundred Ninety-one and 03/100 Dollars ($5,891.03), together with costs and disbursements taxed at Sixty-two and 49/100 Dollars ($62.49), and with interest on said judgment at six per cent (6%)

per annum from the date of said judgment until paid. I hereby authorize the Clerk of said Court to enter satisfaction of record of said judgment in the said action.

Dated this 12th day of Sept., 1960.

/s/ WILLIAM GRIFFITH.

Approved:

/s/ DONALD R. WILSON,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah—ss.

On this 12th day of Sept., 1960, before me, a Notary Public for said County and State, personally appeared William Griffith, to me personally known to be the individual described in and who executed the foregoing satisfaction of judgment, and acknowledged to me that he executed the same freely and voluntarily, for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and seal the day and year last above written.

[Seal] /s/ MARY E. HENDRICKSON,
Notary Public for Oregon.

My commission expires 12/17/63.

[Endorsed]: Filed October 4, 1960.

Duly verified.

[Endorsed]: Filed October 10, 1960.

[Title of District Court and Cause.]

ANSWER OF RESPONDENT

To the Honorable Judges of the above-entitled Court in admiralty sitting:

Comes now the respondent for answer to the libel in personam herein admits, denies and alleges as follows:

I.

Admits the allegations of Articles I, II, III, V, VI of the said libel, but the respondent has no knowledge or information sufficient to form a belief as to the remaining articles and allegations of the said Libel and, therefore, denies the same and the whole thereof.

Wherefore, respondent prays that the Libel herein be dismissed.

GRAY, FREDRICKSON & HEATH,

By /s/ FLOYD A. FREDRICKSON,
Of Proctors for Respondent.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed November 7, 1960.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter came on regularly for a pre-trial conference before the above-entitled Court and the undersigned Judge thereof, libelant appearing by Wood, Wood, Tatum, Mosser & Brooke, its attorneys, and respondent appearing by Gray, Fredrickson & Heath, its attorneys, and the following pretrial order was made.

Nature of the Case

This is a cause of action for indemnity based on contract for damages allegedly sustained by libelant as a result of the alleged negligent performance of a stevedoring contract by respondent.

Procedural Matters

This cause was commenced by the filing of a libel in admiralty in the United States District Court for the District of Oregon; respondent has answered said libel.

Agreed Facts

Libelant and respondent agree upon the following facts and no proof thereof shall be necessary upon the trial of this case.

I.

Libelant is a business concern organized and existing under the laws of Italy, and engaged in the business of operating ocean-going steamships, and

is the owner and operator of the Motor Ship Antonio Pacinotti; respondent is an Oregon corporation engaged in the business of an independent contracting stevedore. This Court has jurisdiction of the subject matter of this cause and the parties hereto upon the admiralty side of the Court.

II.

At all times pertinent herein there existed a contract between libelant and respondent whereby respondent undertook to perform the stevedoring work on libelant's vessels while the same were in Columbia River ports. Pursuant to said stevedoring contract, respondent, as a master stevedore, conducted the stevedoring operations on the MS Antonio Pacinotti on or about November 19, 1958, while said vessel was in the port of Portland, Oregon. In so doing, respondent employed one William Griffiths as a longshoreman for work aboard said vessel. At said time and place respondent supplied a hatch tent, together with appurtenant tie down ropes for use by the longshoremen in the stevedoring operations aboard the vessel.

III.

On or about November 19, 1958, while respondent was conducting stevedoring operations aboard said vessel, said William Griffiths, in the course of his employment, pulled on one of the said tie down ropes on said hatch tent, which rope parted, resulting in William Griffiths falling to the deck of the vessel and resulting in personal injuries to him.

IV.

As a result of said fall and resulting injuries, William Griffiths brought an action at law against the libelant in the Circuit Court of the State of Oregon for the County of Multnomah, bearing Clerk's number 261-553.

V.

Libelant gave formal notice to respondent to come in and defend said action and assume responsibility therefor. Said notice read as follows:

"Oregon Stevedoring Company
3630 N. W. Front
Portland, Oregon

Gentlemen:

We refer to the above matter. We represent Italia Societa Per Azione Di Navigazione (Italian Line), owner of the M/V Antonio Pacinotti. On or about 19 November 1958, one of the longshoremen in your employ, Mr. William Griffith, was injured aboard the M/V Antonio Pacinotti while the vessel was moored at Terminal 1, Portland, Oregon.

Mr. Griffith alleges he sustained injuries when he was heaving on a hatch tent rope which parted, causing him to fall to the deck.

At the time and place of this accident Oregon Stevedoring Company was under contract with the vessel's owner to perform the stevedoring work aboard the vessel. Oregon Stevedoring Company

owned the tent rope in question and controlled the longshore activities aboard ship.

William Griffith filed a complaint in the Multnomah County Circuit Court. It has been superseded by an amended complaint, a copy of which is enclosed.

From our investigation of this accident, it appears that Oregon Stevedoring Company is responsible for William Griffith's injuries. Therefore, on behalf of the M/V Antonio Pacinotti and her owners, we hereby tender the defense of said action to you and give you notice to so defend. We further notify you that if the vessel Antonio Pacinotti and/or her owner are held liable to William Griffith in said action Italian Line will hold you liable and seek full indemnity from you for any and all losses, damages and expenses incurred by the vessel and her owner in said action and for any judgment suffered by it and for all costs and expenses incurred in investigating, preparing and defending said action, including reasonable attorney's fees.

Your failure to answer this letter within ten days of receipt thereof will be deemed a rejection of this notice and tender.

Respondent failed and refused to take any action whatsoever with respect to said notice.

VI.

The said action proceeded to trial and the jury returned a verdict in favor of William Griffith and

against the libelant, and a judgment was entered thereon against libelant for the sum of $5,891.03, together with costs and disbursements taxed at $62.49, with interest on said judgment from the date thereof until paid. Libelant satisfied said judgment on the 12th day of September, 1960, by the payment of $5,953.52.

Libelant's Contentions

Libelant contends and the respondent denies the following:

1. Respondent breached its stevedoring contract with libelant to perform the stevedoring work aboard said vessel in a safe, proper and workmanlike manner in one or more of the following particulars:

a. In negligently providing a hatch tent with appurtenant tie down ropes, one of which said ropes was weak, defective and rotten;

b. In negligently failing to inspect said tie down rope before supplying it for use aboard said vessel.

c. In negligently failing to test said tie down rope before supplying it for use aboard said vessel.

d. In supplying a tent tie down rope which failed in the course of being used for the purpose and in the manner for which it was supplied.

2. As a proximate and foreseeable result of said breach of contract, said William Griffith was in-

jured, and libelant, by reason of the ensuing action at law and judgment therein and the necessary payment thereof, has been damaged in the sum of $5,953.52, and in the further sum of $1,250.00 attorney's fees and $295.80 costs and expenses necessarily incurred by libelant in the defense of said action.

3. Respondent is liable to indemnify libelant in full for said loss and damage in the sum of $7,499.32.

Respondent's Contentions as Against Libelant

The respondent contends and the libelant denies as follows:

Issues

The issues of this case are raised by the contentions of the parties and denials thereof.

Physical Exhibits

Certain physical exhibits have been identified and received as pre-trial exhibits, the parties agreeing, with approval of the Court, that no further identification of these exhibits is necessary. In the event that the exhibits, or any of them, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only upon the grounds of relevancy, competency and materiality.

Libelant's Exhibits

1. Reserved. Amended Complaint.

2. Reserved. Excerpts of Proceedings.
3. Reserved. Judgment Order.
4. Reserved. Cost Bill.
5. Reserved. Satisfaction of Judgment.
6-A. Bill from Wood's office.
6-B. Bill from Wood's office.
7. Answers to Interrogs.
8. Responses to Request for Admissions.
9. Old Rope.
10. New Rope.

Respondent's Exhibits

21. Contract between Libelant and Respondent.

Expert Testimony

Each of the parties hereto reserves the right to call experts as witnesses to give opinion evidence on matters upon which experts can give their opinions on the issues made up by the contentions of the parties and denials thereof.

The foregoing constitutes a pre-trial order in the above matter and supersedes the pleadings herein and may be amended hereafter upon consent of the parties or in furtherance of justice or to conform with the proof.

Dated this 9th day of March, 1961.

/s/ GUS J. SOLOMON,
United States District Judge.

Approved:

/s/ JOHN G. HOLDEN,
Of Attorneys for Libelant.

/s/ LLOYD W. WEISENSEE,
Of Attorneys for Respondent.

Lodged January 17, 1961.

[Endorsed]: Filed March 9, 1961.

[Title of District Court and Cause.]

OPINION
April 21, 1961

Solomon, Judge:

Libelant, owner of the vessel SS Antonio Pacinotti, brought this action against the respondent Oregon Stevedoring Company, to recover the amount which it was required to pay in satisfaction of a judgment recovered against it by William Griffith, an employee of the respondent.

Griffith, a longshoreman, was injured aboard the SS Antonio Pacinotti when a 3/4" rope upon which he was pulling broke and threw him to the deck. The rope was permanently attached to a tent supplied by respondent. Griffith's case was submitted to the jury in the state court on both negligence and unseaworthiness, and a general verdict was rendered against the libelant.

Prior to the accident, the libelant and respondent had entered into a stevedoring contract which provided: "Stevedoring Company will be responsible * * * for injury to or death of any person caused by its negligence * * *"

In this action, libelant seeks indemnification from the respondent for the amount of the judgment plus costs, on two theories: (1) the respondent was guilty of negligence; and (2) respondent breached its implied warranty of workmanlike service.

Libelant's contention that the state court judgment is conclusive as to the issue of respondent's negligence is without merit. Since the verdict was a general one, no one can tell whether the jury found in favor of Griffith on the issue of negligence or on unseaworthiness or on both. Security Insurance Co. of New Haven v. Johnson, 10 Cir. 1960, 276 F. 2d 182. It is regrettable that the trial court failed to submit a special verdict to the jury. Such a verdict would have established the basis of the jury's action.

I have serious doubts as to whether the doctrine of res ipsa loquitur is applicable in this case. However, even if applicable, I think the respondent has overcome any presumption or inference of negligence.

I likewise find that the libelant is not entitled to recover on its alternative theory of implied warranty. Here, the contract between the parties expressly limited the respondent's liability to its negli-

gence. It is a clear and unambiguous provision, and in my opinion negatives an implied warranty of workmanlike service.

The libel is dismissed.

[Endorsed]: Filed April 21, 1951.

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for hearing on the libelant's objections to the respondent's Proposed Findings of Fact and Conclusions of Law and the libelant's Proposed Findings of Fact, the libelant being represented by Erskine B. Wood and John G. Holden and the respondent being represented by Floyd Fredrickson. This is a libel in personam and the cause came on for trial before the Court sitting in admiralty and the Court considered the evidence and rendered an opinion on April 21, 1961, and being fully advised does hereby revoke and set aside the Findings of Fact and Conclusions of Law previously signed and entered herein and does hereby make and enter its Findings of Fact and Conclusions of Law in pursuance of Admiralty Rule 46½ as follows:

(1) Libelant is now and at all times material was a business concern organized and existing under the laws of Italy and is the owner and operator of the Motor Ship Antonio Pacinotti.

(2) Respondent is now and at all material times

was an Oregon corporation engaged in the business of an independent contracting stevedore.

(3) Prior to the accident hereinafter described, libelant and respondent had entered into a stevedoring contract (respondent's exhibit 21), whereby respondent undertook to perform the stevedoring work on libelant's vessels while the same were in Columbia River ports. This contract provided in part:

"II.

It is understood and mutually agreed by the parties hereto:

A. That the Stevedoring Company will furnish all necessary labor and supervision and all ordinary gear for the performance of the services described in this contract, including winch drivers and usual appliances used for stevedoring; and

B. That the Steamship Company will furnish suitable booms, winches, blocks, and falls, steam and/or power and lights and will maintain the same in safe and efficient working conditions during the progress of the work.

* * *

VIII.

The Stevedoring Company will be responsible for damage to the ship and its equipment, and for damage to cargo or loss of cargo overside, and for injury to or death of any person caused by its negligence, provided, however, when such damage occurs to the ship or its equipment, or where such damage or loss occurs to cargo, the ship's officers

or other authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence. The Steamship Company shall be responsible for injury to or death of any person or for any damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment."

(4) This stevedoring contract was prepared and drawn up by respondent and presented in a printed form.

(5) Pursuant to the stevedoring contract between libelant and respondent, respondent conducted the stevedoring operations on the MS Antonio Pacinotti on November 19, 1958, while said vessel was lying in the Willamette River in the Port of Portland, Oregon. The Willamette River is a navigable water of the United States and the stevedoring contract is a maritime contract.

(6) William Griffith, a longshoreman employed by respondent, was injured aboard the MS Antonio Pacinotti on November 19, 1958, when a ¾-inch rope upon which he was pulling broke and threw him to the deck. The rope was permanently attached to a Seattle hatch tent supplied by respondent.

(7) William Griffith brought an action at law against the libelant in the Circuit Court of the State of Oregon for the County of Multnomah. At the trial of that action two issues of liability were presented by the Court's instructions, to wit:

(a) Was the vessel unseaworthy in that the rope was rotten and defective and unsafe to heave on, and

(b) Was the shipowner negligent in failing to supply or furnish a tent line of proper strength.

A general verdict was returned against the libelant. Libelant satisfied the resultant judgment on September 12, 1960, by payment of $5,953.52 (libelant's exhibit 5).

(8) Prior to the trial of the case brought by William Griffiths against the libelant, the libelant tendered the defense of said case to respondent, which tender was rejected by respondent.

(9) In addition to the amount paid by libelant to satisfy said judgment, libelant incurred reasonable attorneys' fees and necessary costs and expenses in the defense of said State Court action in the sum of $1,545.80.

(10) The Seattle hatch tent tie-down rope in question was permanently spliced to an eye in the tent. At the time of the accident Griffith and his work partner had passed the rope through a deck fixture and back up and through the splice by which the rope was permanently attached to the tent.

(11) Griffith was pulling on the free end of the rope when it broke. The rope broke between the point where it ran through the splice.

(12) At the point where the rope ran through the splice, the rope ran across other rope and not across any metal.

(13) It is not usual for a rope of this type to break when one man is pulling on it. Three, four or five men can usually pull on a rope of this type without its breaking.

(14). The rope in question was made of Manila and its size and type had a rated breaking strength of 5,400 pounds.

(15) At the moment the rope broke it was defective and unfit for the purpose for which it was intended.

(16) The Seattle hatch tent and tent tie-down rope involved herein were owned, supplied, rigged and exclusively controlled by respondent at all times material. Said tent rope was the respondent's gear and equipment.

(17) At the time that the rope broke the rope was being used for the purpose and in the manner for which it was supplied by respondent for use by respondent's employees.

(18) The securing of the tent and the manner in which the tent and tent rope were being secured were entirely and exclusively within the supervision and control of respondent.

(19) The injuries to Griffith were the natural and foreseeable consequences of the breaking of the rope.

(20) There is no evidence, outside of the written contract itself, as to the intent of the parties with respect to construction or interpretation of the

stevedoring contract, or with respect to implied obligations under said contract.

(21) The tent line when supplied by respondent to libelant was a proper type of rope for use as a tent rope and there was no evidence that it was in an unsatisfactory condition.

(22) Respondent used reasonable care to provide libelant with a proper tent tie down rope and has overcome any inference of negligence which might be inferred on behalf of libelant.

Conclusions of Law

(1) This cause is within the admiralty and maritime jurisdiction of the United States and of the above-entitled Court.

(2) The judgment rendered in the State Court action against the libelant is not conclusive as to the issue of respondent's negligence.

(3) The respondent was not negligent.

(4) The contract between libelant and respondent limits respondent's liability to its negligence.

(5) The libelant is not entitled to recover from respondent, and its libel should be dismissed and respondent is entitled to recover its costs herein.

Dated and entered this 20th day of June, 1961.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed June 20, 1961.

In the United States District Court
For the District of Oregon

Civil No. 60-375

ITALIA SOCIETA' PER AZIONI DI NAVIGAZIONE,

Libelant,

vs.

OREGON STEVEDORING COMPANY, INC.,

Respondent.

DECREE

This Matter having come on regularly for hearing before the undersigned Judge of the above-entitled Court, libelant appearing through John G. Holden, of its proctors, and respondent appearing through Floyd A. Fredrickson, of its proctors, and the Court having heard the evidence and considered the Memoranda submitted by counsel and now being fully advised in the premises and having rendered a written Opinion on file herein and having made and filed its Findings of Fact and Conclusions of Law, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. The libel is dismissed with costs taxed in favor of the respondent and against the libelant at $32.72.

Dated this 20th day of June, 1961.

/s/ GUS J. SOLOMON,
United States District Judge.

Presented by:
/s/ FLOYD A. FREDRICKSON,
Of Proctors for Respondent.

[Endorsed]: Filed June 20, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Oregon Stevedoring Company, Inc., and Gray, Fredrickson & Heath, Floyd A. Fredrickson, its proctors:

Notice is hereby given that libelant Italia Societa Per Azioni Di Navigazione, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final decree entered herein on June 20, 1961, which decree dismissed the libel and denied libelant's claim against respondent.

Dated this 15th day of September, 1961.

WOOD, WOOD, TATUM,
MOSSER & BROOKE,

/s/ ERSKINE B. WOOD,
Proctors for Libelant.

Service of copy acknowledged.

[Endorsed]: Filed September 15, 1961.

[Title of District Court and Cause.]

APPELLANT'S POINTS ON APPEAL AND ASSIGNMENTS OF ERROR

Libelant-appellant relies upon the following points on appeal and assignments of error:

Points on Appeal

I.

Respondent as contracting stevedore owed to libelant an implied warranty to render workmanlike service and to furnish and maintain in good condition, fit for the purpose intended, the equipment owned and supplied by, and at all times in the exclusive possession and control of respondent.

II.

Respondent breached this warranty in that a hatch tent tie-down rope, owned and supplied by, and at all times in the exclusive control and possession of, respondent, was defective and unfit for the purpose intended, as a result of which it broke while being used by respondent causing the accident, and causing damages to libelant.

III.

The written stevedoring contract between libelant and respondent does not relieve respondent from liability for this breach of warranty.

Assignments of Error

1. The Trial Court erred in failing to conclude as a matter of law that respondent owed to libelant

an implied warranty to render workmanlike service and maintain in good condition the equipment owned and supplied by, and at all times in the exclusive possession and control of, respondent.

2. The Trial Court erred in its conclusion of law (Conclusion No. 4) that the contract between libelant and respondent limits respondent's liability to its negligence.

3. The Trial Court erred in its conclusion of law (Conclusion No. 5) that libelant was not entitled to recover from respondent, and that the libel should be dismissed.

4. The Trial Court erred in failing to conclude that libelant was entitled to recover from respondent.

5. The Court erred in entering a decree in favor of respondent dismissing the libel, and in failing to enter a decree in favor of libelant and against respondent for the amount of libelant's damages with interest and costs.

Dated this 25th day of September, 1961.

WOOD, WOOD, TATUM,
MOSSER & BROOKE,

By /s/ ERSKINE B. WOOD,
Proctors for Libelant-
Appellant.

Service of copy acknowledged.

[Endorsed]: Filed September 28, 1961.

EXHIBIT No. 21

Cable Address: "Oreste"

Oregon Stevedoring Company
3630 N. W. Front Avenue
Portland 10, Oregon

Stevedoring Contract

Memorandum of Agreement

Made this 16th day of June, 1958.

Between Oregon Stevedoring Company (hereinafter called the Stevedoring Company, First Party, and The Italian Line (hereinafter called the Steamship Company, Second Party,

I.

It is mutually agreed between the parties hereto, that the Stevedoring Company will act as stevedores, and that they will with all possible dispatch, load and/or discharge all cargoes of vessels owned, chartered, controlled, or managed by the Steamship Company at all Columbia and Willamette River ports as directed. And it is agreed that the Steamship Company will grant to the said Stevedoring Company the exclusive rights of handling all such cargoes as before mentioned under the terms of this agreement, and will pay for the work done by the Stevedoring Company in lawful money of the United States at the rates set forth in Schedule "A," attached hereto and made part thereof.

II.

It is understood and mutually agreed by the parties hereto:

A. That the Stevedoring Company will furnish all necessary labor and supervision and all ordinary gear for the performance of the services described in this contract, including winch drivers and usual appliances used for stevedoring; and

B. That the Steamship Company will furnish suitable booms, winches, blocks, and falls, steam and/or power and lights and will maintain the same in safe and efficient working conditions during the progress of the work.

III.

It is understood and agreed that, in the execution of the work under this contract, the provisions of any labor agreement existing between the longshoremen and/or other labor groups and the waterfront employers governing (or in the absence of such labor agreement, any regulations or current practices of the port applicable to) longshore work performed in the ports in the Columbia River District shall be observed.

IV.

A. All stevedoring rates specified are based on, and subject to, the employment of present longshore and related labor at the wage scales and under the working conditions existing in the port as of the date of the execution of this contract, under respective labor agreements between the longshoremen and/or other labor groups and the waterfront em-

ployers. In the event of an increase or decrease in such wage scales or a change in such working conditions, the rates specified herein shall, as a consequence, be proportionately increased or decreased, as of the effective date of such change retroactively, currently or prospectively, as the case may be.

B. The rates and charges provided for in this contract are, and the rates and charges provided for in all previous contracts between the Stevedoring Company and the Steamship Company were, predicated upon the assumption that the present practices of the port, in respect to the determination of straight and overtime rates of pay for labor, are and were in compliance with the provisions of the Fair Labor Standards Act. In the event it shall hereafter be determined that the provisions of the Fair Labor Standards Act require the payment of compensation in excess of that required by applicable and prevailing labor agreements and the practice of the port, then the Stevedoring Company shall be reimbursed by the Steamship Company for any additional overtime or other payments for which the Stevedoring Company may be liable under the terms of the Fair Labor Standards Act in respect to work performed under this contract or such previous contracts.

V.

The Steamship Company agrees that the officers of its vessels are to give every assistance at their command to facilitate the work of loading and discharging its vessels.

~~VI.~~

~~It is agreed that night work is to be avoided as far as possible, owing to the recognized inefficiency of labor in performing night services.~~

VII.

The Stevedoring Company shall carry:

A. Workmen's Compensation insurance for the protection of its employees under State and Federal Laws;

B. Public Liability insurance in the amount of $250,000.00 as respects bodily injury or death of one person, and in the amount of $500,000.00 as respects bodily injury to, or death of, more than one person, on account of any one accident, as protection against injury to or death of any person or persons arising out of negligence of the Stevedoring Company under this agreement.

C. Property damage insurance in the amount of $1,000,000.00 as protection against loss or injury to property arising out of negligence of the Stevedoring Company under this agreement.

VIII.

The Stevedoring Company will be responsible for damage to the ship and its equipment, and for damage to cargo or loss of cargo overside, and for injury to or death of any person caused by its negligence, provided, however, when such damage occurs to the ship or its equipment, or where such damage or loss occurs to cargo, the ship's officers or other

authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence. The Steamship Company shall be responsible for injury to or death of any person or for any damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment.

IX.

In the event of strikes, lockouts, union disputes, or other labor disturbances, the Stevedoring Company will be under no obligation to undertake performance of this contract. No liability shall attach to the Stevedoring Company if the terms of this agreement cannot be performed due to acts of God, riots, civil or labor disturbances, war, restrains of governments, fire, explosion, or other acts beyond its control.

~~X.~~

~~The Stevedoring Company shall collect and retain any customary charges for labor services in connection with the direct loading and unloading of railroad cars, lighters, barges, scows.~~

XI.

This agreement is subject to the following conditions regarding the delivery and acceptance of cargo:

A. All cargo to be discharged is to be delivered on wharf or onto open lighters alongside of ship at end of ship's tackle unless otherwise specified with

respect to any specific commodities enumerated in Schedule "A." All cargo to be loaded is to be taken delivery of from wharf or open lighter or cars alongside of ship within reach of ship's tackle, unless otherwise specified with respect to specific commodities enumerated in Schedule "A," or in case of grain or cereals, at the mouth of conveyor or chute on wharf (where such is used).

~~D. When the Stevedore handles cargo to and/or~~ from Place of Rest on the dock, the Stevedoring Company shall sort the cargo on the dock as discharged, according to the Bill of Lading lot or lots and mark or marks; truck the cargo a reasonable distance to and from the ship's tackle; pile the cargo on the dock and break down piles as high as one man can handle. Any extra sorting, piling, breaking down of piles, repiling, will be charged for ~~at payroll, plus ——— %.~~

XII.

This agreement is subject to the following provisions with respect to charges for overtime, ship's time, handling of damaged cargo, and other extras:

A. When the Stevedoring Company is required to work at locations where travel time is required to be paid the men, in accordance with the wage scale, such travel time will be charged for at payroll cost. When vessels are working in the stream or other places where means of transportation for the men are required, or hotel or meal allowance

must be paid in accordance with the labor agreement, any expense so incurred will be charged for at cost. The expense of transportation of gear and equipment to and from the stream, will be charged for at cost.

B. Rates set forth in Schedule "A" are to be charged on all cargo handled on the basis of 2000 lbs. weight, or 40 cu. ft. to the ton and/or as specified.

C. Said rates are for work performed during the ordinary straight time working hours on regular working days, as set forth in current Labor Agreements.

D. Said rates for the handling of cargo in regular holds only. For loading and discharging deep tanks, cross bunkers, poop, peak or in similar compartments where cargo has to be handled in excess of 30 feet from hatchway, there will be charged, in addition to said rates, 35 cents per ton, weight or measurement, on all cargo except lumber and ties for which the extra charge will be 65 per M.F.B.M. For unloading stowed ties from cars at ship's tackle, there will be an additional charge of 50 cents per M.F.B.M. This additional charge also to apply when loading in staggered holds.

E. For work performed during overtime and/or penalty hours, or on Saturday, Sundays, legal holidays, or during meal hours, as set forth in current Labor Agreement, the Stevedoring Company, in addition to the rates specified herein, shall be reim-

bursed the amount of its extra payroll ~~cost plus ....%~~. The extra wages paid for such overtime and penalty time will be as set forth in the current labor agreements governing longshore and related labor.

F. All work performed on board, around or in connection with vessels of the Steamship Company, such as shifting coal, shifting or restowing cargo, rigging and unrigging gear, loading or discharging mails, baggage, ship's stores, debris, or dunnage, shifting and laying dunnage, carpenter or coopering work, cleaning holds, handling ship's lines and gangways, and any other ship's work required other than the actual discharging or loading of cargo, shall be charged as "Ship's Time" and shall be paid for at payroll cost plus .....%.

G. When handling cargo damaged by fire, water, oil, etc., and where such damage causes distress or obnoxious conditions, or in all cases where the men are called upon to handle cargo under distress conditions, the Stevedoring Company charges are to be based upon the payroll cost, in accordance with the labor agreements, plus .....% for overhead, and profit, in lieu of the rates specified herein together with the cost of gear destroyed, and the cost of equipment for the protection of the men as may be required. If the condition of the cargo or packages or vessel or pier is other than in customary good order, thereby delaying prompt handling, special arrangements shall be agreed upon in lieu of the rates herein specified.

H. Whenever work is interrupted after starting and detention of less than fifteen minutes delay occur, the Stevedoring Company will make no charge for reimbursement thereof. For detention time of fifteen minutes or more, the Stevedoring Company will charge full detention time at labor cost. When men are employed and unable to work through causes beyond the Stevedoring Company's control, or when men are to be paid for a minimum working period in accordance with the labor agreement, the cost of such waiting or idle time will be charged for by the Stevedoring Company at payroll cost plus ....%.

I. For loading or discharging lifts of 8000 lbs. or over, see provisions under "Heavy Lifts" in Schedule "A."

XIII.

The term "payroll cost" as used herein shall in addition to wages include workmen's compensation, public liability and property damage insurance, social security and unemployment taxes, and longshoremens pension, vacation, health and welfare and mechanization assessments when applicable.

XIV.

This Agreement shall be in force and effect until terminated by either party giving thirty days' written notice to the other. The rates named in Schedule "A" shall, at the request of either party, be subject to review and adjustment after 60 days from date hereof, and periodically thereafter.

In Witness Whereof the parties hereto have duly executed this agreement in duplicate the day and year first above written.

OREGON STEVEDORING COMPANY,

By.....
President.

THE ITALIAN LINE,

By GENERAL SS CORPORATION, LTD.,
As Agents.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Keith Burns, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Libel; Answer of Respondent; Pre-Trial Order; Opinion of Judge Gus J. Solomon; Findings of Fact and Conclusions of Law; Decree; Notice of Appeal by Libelant; Appellant's Points on Appeal and Assignments of Error; Designation of Record on Appeal; Motion and Order to Forward Exhibit 21 to Court of Appeals, and Transcript of Docket Entries constitute the record on appeal from a decree of said court in a cause therein numbered Civil 60-375 in which Italia Societa Per Azioni Di Navi-

gazione is the libelant and appellant and Oregon Stevedoring Company, Inc., is the respondent and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith Respondent's exhibit No. 21, and

I further certify that the cost of filing the notice of appeal, $5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 21st day of October, 1961.

[Seal] KEITH BURNS,
Clerk,

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 17616. United States Court of Appeals for the Ninth Circuit. Italia Societa Per Azioni Di Navigazione, Appellant, vs. Oregon Stevedoring Company, Inc., Appellee. Transcript of the Record. Appeal from the United States District Court for the District of Oregon.

Filed October 26, 1961.

Docketed November 10, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 42]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Barnes, Hamlin & Jertberg, Circuit Judges.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—August 1, 1962

This cause coming on regularly for hearing or submission, Mr. Erskine B. Wood, argued for the appellants and Mr. Floyd A. Fredrickson, argued for the appellee and thereupon the Court ordered the cause submitted for consideration and decision.

[fol. 43]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Barnes, Hamlin & Jertberg, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—October 25, 1962

Ordered that the typewritten opinion and dissenting opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment be filed and recorded in the minutes of this Court in accordance with the majority opinion rendered.

[fol. 44] IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,616

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, Appellant,

vs.

OREGON STEVEDORING COMPANY, INC., Appellee.

Appeal from the United States District Court for the District of Oregon.

OPINION—October 25, 1962

Before: Barnes, Hamlin and Jertberg, Circuit Judges.

HAMLIN, Circuit Judge:

Appellant, Italia Societa Per Azioni di Navigazione, a shipowner, contracted with the Oregon Stevedoring Company, Inc., appellee herein, for the performance of stevedoring services on appellant's ship, the M.S. Antonio Pacinotti. On or about November 19, 1958, during the course of stevedoring operations a longshoreman named Griffith, an employee of the stevedoring company, was injured due to a latently defective rope which had been brought onto the ship by the stevedoring company. Griffith recovered a judgment against appellant shipowner which it satisfied. Thereafter, in a separate action appellant shipowner brought suit against appellee stevedoring company claiming indemnity from appellee for the amount of the judgment which it had been required to pay Griffith. Appellant based its claim for indemnity on the ground that the stevedoring company had been negligent and had breached its warranty of workmanlike service in supplying the defective rope. The stevedoring contract contained an express warranty whereby the stevedoring company undertook to indemnify the shipowner for negligence in the perform-[fol. 45] ance of its services.[1] The district court found that

[1] The express indemnity clause read:

The Stevedoring Company will be responsible for damage to the ship and its equipment, and for damage to cargo or loss of cargo

the stevedoring company had not been negligent in any way in bringing onto the ship the rope which caused injury to the longshoreman. The district court held that the presence of the express warranty covering negligence precluded any recovery for breach of an implied warranty of workmanlike service, in essence relying on the maxim *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). Judgment was entered for the stevedoring company and the shipowner appealed to this court which has jurisdiction pursuant to 28 U.S.C.A. § 1291.

No complaint is made on this appeal of the district court's finding that the stevedoring company was not negligent. Appellant contends merely that an implied warranty of workmanlike service arose from the contractual relationship between the parties which implied warranty placed a duty upon the stevedoring company to supply proper and seaworthy equipment. It is contended that a failure to supply seaworthy equipment is a breach of the implied warranty of workmanlike service which entitles the shipowner to indemnity for any liability it incurs resulting from the faulty equipment regardless of whether the stevedoring company was negligent in supplying the equipment. Assuming that there is an implied warranty which covers the facts of this case, the appellant shipowner argues that the mere presence of the express clause indemnifying for negligence does not preclude a recovery on the implied warranty. It will be unnecessary to consider the last contention if we determine that the warranty of workmanlike service does not include elements of liability without fault, [fol. 46] i.e., that the stevedoring company absent negli-

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overside, and for injury or death of any person caused by its negligence, provided, however, when such damage occurs to the ship or its equipment, or where such damage or loss occurs to cargo, the ship's officers or other authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence. The Steamship Company shall be responsible for injury to or death of any person or for damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment.

gence on its part does not warrant the suitability of the equipment which it supplies pursuant to its stevedoring contract.

We address ourselves, then, to the question whether a stevedoring company breaches its implied warranty of workmanlike service, which breach results in indemnity to the shipowner, when it supplies unseaworthy equipment to a ship on which it is to perform stevedoring services even though the stevedoring company has not been negligent in any way.

The leading case on indemnity liability for breach of the implied warranty of workmanlike service is *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In that case a stevedoring company had agreed to perform stevedoring services and one of its employees was injured during the unloading. A jury returned a verdict for the longshoreman against the shipowner. The shipowner had impleaded the stevedoring company claiming that it was entitled to full indemnity because the stevedoring company had negligently failed to stow the cargo in a safe and proper manner which negligence caused the shipowner to be liable to the longshoreman. The informal stevedoring contract made no reference to an express indemnity agreement. After rejecting the contention of the stevedoring company that indemnity was precluded by the provision in the Longshoremen's and Harbor Worker's Compensation Act which made a longshoreman's recovery of compensation his exclusive remedy against his employer,[2] the Court held that the shipowner was entitled to indemnity based on the stevedoring company's breach of its implied warranty of workmanlike service.

Prior to Ryan the Court had recognized that a stevedoring company could by contract expressly agree to indemnify the shipowner for any liability to longshoremen occasioned by the fault of the stevedoring company, *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947). Where the contract did not deal expressly with indemnity such liability arose from the stevedoring company's obligation to perform

[2] Longshoremen's and Harbor Worker's Compensation Act § 5, 33 U.S.C.A. § 905.

[fol. 47] its services in a workmanlike manner. The contractual obligation was described as a "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product." The warranty "is of the essence of . . . [the] stevedoring contract."[3] In *Ryan* the obligation was to stow the cargo "properly and safely" and a breach of the obligation was a breach of the warranty of workmanlike service giving rise to a right in the shipowner of indemnity against the stevedoring company for money which the shipowner became liable to pay to a longshoreman on account of the breach.

Much judicial effort since *Ryan* has been concerned with defining the nature and scope of a stevedoring company's implied warranty of workmanlike service. But only one case, *Booth S.S. Co.* v. *Meier & Oelhaf Co.*, 262 F.2d 310 (2d Cir. 1958), has decided that the warranty of workmanlike service includes elements of liability without fault. In the *Booth* case a contractor who undertook to repair a ship brought some unseaworthy equipment on board which caused injury to a workman and as a result the shipowner was liable for unseaworthiness. Indemnity was sought from the contractor, but the district court dismissed the third-party claim of the shipowner since there had been no proof that the contractor had been negligent in supplying the equipment. On appeal the parties agreed that neither of them had been negligent, and the court stated that the question was whether the contractor could be liable for indemnity where it had supplied defective equipment without fault. Recognizing that the question had not been decided before, the court, nevertheless, did not believe that the leading cases on indemnity excluded "the existence of liability without fault as an element of the warranty of workmanlike service in appropriate cases."[4] After its discussion the court stated:

> [We] hold that if the contractor undertook to do the work of repair of the vessel's engines, and if he sup-

[3] 350 U.S. at 133-134.

[4] 262 F.2d at 313. The court did not intimate what it meant by "appropriate cases".

> plied the equipment which failed in the course of the use for which it was supplied, then the failure constituted a breach of the contractor's warranty of workmanlike service and rendered him liable to indemnify [fol. 48] the owner for damages paid to the contractor's employee on account of injuries resulting directly from the failure.[5]

Appellant shipowner in the instant case urges us to follow the Second Circuit's *Booth* decision and therefore hold the stevedoring company liable for indemnity for bringing onto the ship a defective rope even though the stevedoring company was not negligent in any way. Appellee stevedoring company argues that some negligence of the stevedoring company is required to constitute a breach of its implied warranty of workmanlike service. Appellee would also have us distinguish *Booth* from the instant case on the ground that *Booth* involved a repairman whereas this case involves a stevedoring company. We consider *Booth* to be indistinguishable from this case on the ground urged or any other. In the context of this case a repairman cannot be distinguished from a stevedoring company. Any distinction in kind is without legal significance. However, we find ourselves in disagreement with the result reached in *Booth* that non-negligent action can give rise to indemnity liability.[6] Thus, we refuse to follow the Second Circuit on the point here involved.

It is our belief that the term "warranty of *workmanlike* service" is not properly susceptible to an interpretation

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[5] 262 F.2d at 314-315.

[6] The Court in *Booth* felt that it was not unreasonable to require the supplier of equipment to test and inspect the materials "the omission of which would not constitute negligence." (262 F.2d at 314.) However, what the court was articulating was a basis for strict liability without fault and it would seem that discussion of a burden to make tests the omission of which would not be negligence is inappropriate for the reason that standards of conduct and of performance are irrelevant where strict liability is imposed. Strict liability doesn't depend on what one does or does not do according to any set standard of care. The court's discussion would seem, rather, to be no more than an attempt to state a justification for risk-shifting from one party to another.

which makes an act done free of negligence and totally without fault the basis of a breach of the warranty. We think the word "workmanlike" means a "proper", "safe" and "non-negligent" manner of doing something. "Workmanlike" has been defined as "skillful" or "well done" and is said to be synonymous with "deft", "proficient" or [fol. 49] "adept",[7] all words which connotate a standard of skill similar to that associated with the reasonable man test for negligence. Cases discussing the legal meaning of "workmanlike" are replete with words and phrases of similar import.[8]

We have scrutinized the leading Supreme Court cases in the field and have found in the Court's discussion terms the repeated use of which support a conclusion that "workmanlike" describes an ordinary standard of care in the performance of a service the breach of which standard is equivalent to negligence. Thus, in the *Ryan* case, *supra*, the Court stated that the stevedoring company's contractual obligation is to stow the cargo "with reasonable safety," "properly and safely" and "in a reasonably safe manner"; the liability of the stevedoring company arises from "improper" stowage and the "failure to stow . . . 'in a reasonably safe manner' "; "competency and safety of stowage are inescapable elements of the service undertaken"; the recovery of the shipowner on his contract may turn upon the "standard of the performance" of the stevedoring service; and the duty of the stevedoring company is to hold the shipowner harmless from "foreseeable damages."

In *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958), the Court held that it was error to take a case from the jury on the question of indemnity where there was evidence tending to establish negligence on the part of the stevedoring company even though the shipowner had been held liable to the longshoreman only on the basis of negligence and not for unseaworthiness of

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[7] Webster's New International Dictionary 2952 (2d ed. unabridged) ("workmanlike").

[8] See cases cited in 18A *Words & Phrases* 22 ("Good and Workmanlike Job") and 45 *Words & Phrases* 520 ("Workmanlike manner") (permanent ed.).

the vessel.[9] In *Weyerhaeuser* much language from *Ryan* (which is set out above) was utilized, and the Court mentioned that the contractual obligation is to perform duties "with reasonable safety"; the stevedoring company is liable if in using ship's gear it renders a "sub-standard performance."

[fol. 50] Statements similar to those in *Ryan* and *Weyerhaeuser* appear in the three later cases where the Supreme Court has had occasion to discuss the *Ryan* case and liability for indemnity, Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962); Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959).

We are not unmindful that negligence liability and warranty liability are not identical. Negligence is a liability in tort while warranty is generally associated with contract liability.[10] Nevertheless, as indicated by the Supreme

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[9] The court recognized that at some point activity on the part of the shipowner would preclude its recovery of indemnity from the stevedoring company even though the stevedoring company might also be negligent in some respect. 355 U.S. at 567-568.

[10] In recent history liability for breach of warranty has been associated with contract more than anything else. See Harper & James, *Torts* § 28.16 (1956) and Prosser, *Torts* § 84 (2d ed. 1955). But there is support for the proposition that warranty was originally a tort liability. Prosser, *Torts* 507 (2d ed. 1955). Increasingly, warranty is becoming a liability apart from tort perhaps because much of it does not necessarily depend on fault or the adherence to a standard of care; and warranty is drifting away from contract probably because many who are entitled to a recovery in warranty have no contractual relationship with the person from whom they seek to recover. Concepts of privity of contract are ever more gradually giving way to sweeping coverage of warranty. See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960). While the precise nature of warranty may in general be disputable, it is clear that the warranty of workmanlike service of a stevedoring company arises from contract. Of late, however, the importance of a contract between stevedoring company and shipowner (or ship in the case of a libel *in rem*) has been undermined; its presence is no longer a necessary condition to an indemnity based upon an implied warranty of workmanlike service. Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); Crumady v. The

Court in *Ryan* the recovery of the shipowner in warranty still may turn upon a standard of performance of the stevedoring service. We believe that in the stevedoring cases the standard of performance is the same whether the ultimate liability be in tort (for negligence) or in contract (for breach of warranty).

[fol. 51] Our belief is not altered by the mere fact that there can be no liability of the stevedoring company in tort. In these indemnity cases there is no liability in tort, not because the standard would be different from that of warranty, but rather, because prior to *Ryan* the Supreme Court had decided that there could be no contribution, based on comparative fault, between shipowner and stevedoring company in respect of seamen's injuries on the ground that there had been no contribution in the common law between joint tort feasors. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952).[11] The entire liability in tort (including liability for unseaworthiness) would rest upon the shipowner since a longshoreman's right to workmen's compensation under the Longshoremen's and Harbor Workers' Compensation Act is his exclusive remedy against the wrongdoing of his employer, the stevedoring company.[12] This latter legislative reality when juxtaposed on the rule of the *Halcyon* case, *supra*,

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Joachim Hendrik Fisser, 358 U.S. 423 (1959). In *Waterman* and *Crumady* the shipowner was allowed to recover for breach of warranty even though there was no direct contract relationship between him and the stevedoring company. However, the contract idea was adhered to since the ship or shipowner were considered to be the third-party beneficiaries of the contract between the stevedoring company and the one who contracted for its services.

[11] In *Halcyon* a shipowner was sued by a longshoreman and the shipowner impleaded the employer stevedoring company. A jury determined that the shipowner had been 25% responsible for the longshoreman's injuries and that the stevedoring company had been 75% responsible. The district court equally divided the damages analogizing to collision cases. The Supreme Court held that there could be no contribution which lead to the result that shipowner who was only 25% responsible was liable for the whole while the 75% responsible stevedoring company was not liable at all.

[12] See note 2 *supra*.

precluded any possibility of liability of the stevedoring company in tort. If the shipowner was to be relieved at all from the onerous burden of *Halcyon*, liability against the stevedoring company for its wrongs would necessarily have to be predicated upon contract and not tort.[13] This background to *Ryan* cannot be separated from an analysis of the liability of the stevedoring company for breach of the implied warranty of workmanlike service. And when this background is kept in mind it seems reasonable to posit that the warranty of workmanlike service was intended only to impose liability in contract similar to that which would otherwise have been imposed in tort (for being negligent in the performance of stevedoring services)—not that the one (warranty) is the substitute for the other (tort) but that the standard of performance in each case is the same.

[fol. 52] The efforts of the shipowner in this case to hold the stevedoring company for action done without fault is an attempt to impose upon the stevedoring company the same degree of liability for unseaworthiness as that which is imposed upon the shipowner. We see no reason in policy or otherwise why the stevedoring company should be liable for unseaworthiness insofar as that doctrine encompasses liability without fault.[14] Liability of the shipowner for unseaworthiness arises where the ship's gear is not reasonably fit for the purpose for which it is intended. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960). The liability extends to longshoremen and other workmen who are injured while performing duties traditionally done by members of the ship's crew. Seas Shipping Co. v. Sieracki, 328

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[13] See Gilmore & Black, *Admiralty* 366-374 (1957).

[14] Whether a particular set of facts gives rise to an action for negligence alone, for unseaworthiness alone or for both negligence and unseaworthiness is often an extremely difficult question. It has become quite evident that there is a very minute area, if any, which is negligence but not at the same time unseaworthiness. The continued existence of such an area is largely theoretical. The unseaworthy whale has all but swallowed the negligent Jonah. See generally Gilmore & Black, *Admiralty* § 6—34 - 6—44 (1957) and Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L.Q. 381 (1954).

U.S. 85 (1946); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). And liability is imposed upon the shipowner even where the equipment which causes injury to a longshoreman is brought onto the ship by his employer, the stevedoring company. Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954). Just as the longshoreman is entitled to the warranty of seaworthiness while performing duties traditionally done by the ship's crew, the liability imposed with respect to equipment brought on board by the stevedoring company or other contractor would seem to rest upon the similar proposition that the gear was traditionally that which belonged to the ship. But the liability for unseaworthiness is the shipowner's not the stevedoring company's. The liability is absolute and non-delegable. Mitchell v. Trawler Racer, Inc., *supra;* Seas Shipping Co. v. Sieracki, *supra;* Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

The Supreme Court has recognized that the respective duties of the stevedoring company and the shipowner to the longshoreman rest upon different principles than do [fol. 53] their liabilities with respect to each other.[15] In view of this factor there would seem to be no necessary reason why a shipowner could not be liable without the stevedoring company always being liable at the same time to the shipowner. The shipowner is liable to the longshoreman for negligence and unseaworthiness and the stevedoring company is liable to the longshoreman for workmen's compensation, but this is not to say that as between the two the stevedoring company is liable to the same extent and upon the same basis as the shipowner. The stevedoring company's liability arises only from its contractual arrangement with the shipowner.[16] We believe the stevedoring company's warranty of workmanlike service is only breached (giving rise to indemnity) where it has rendered a sub-

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[15] See Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 568 (1958) and Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 134 (1956).

[16] *But see* note 10 *supra* in connection with *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421 (1960) and *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959).

standard, negligent performance. Such negligence on the part of the stevedoring company can of course give rise to unseaworthiness liability of the shipowner and in that situation there would be indemnity.[17] But we believe indemnity liability cannot arise from non-negligent actions done entirely without fault. The liability of the shipowner to the longshoreman for unseaworthiness arises from a policy to protect the longshoreman at the expense of the shipowner who presumably is better able to shoulder the risk of loss. No doubt this policy in part received impetus from the historical dogma that seamen are the wards of the admiralty court. But the stevedoring company is not liable for unseaworthiness, and we can see no policy comparable to that which gives rise to the shipowner's liability which would compel an indemnity in favor of the shipowner where the stevedoring company has not been negligent.

We do not believe the Supreme Court's characterization of the warranty of workmanlike service as being "comparable to a manufacturer's warranty of the soundness of its manufactured product"[18] precludes the result reached in this case. It must be recognized that the warranty of workmanlike service is in some sense different from the [fol. 54] manufacturer's warranty in that the former involves the performance of a service—unloading of vessels —while the latter attaches to a product that is made. Moreover, although some warranties result in strict liability of the manufacturer, certainly not all of them do.[19] We think a fair interpretation of all the langauge used in the leading cases (and the results reached in the plethora of other cases) is that the stevedoring companies are not liable for breach of the warranty of workmanlike service in the absence of some negligence.

We realize that stevedoring companies and shipowners enjoy considerable freedom of contract with respect to liability for indemnity, and we have no doubt that agreements

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[17] *E.g.*, Crumady v. The Joachim Hendrik Fisser, *supra* note 16.

[18] Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 133-34 (1956).

[19] See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960).

could be made to cover expressly the action which we have said does not come within the implied warranty of workmanlike service. American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947).

In view of our decision that the warranty of workmanlike service could not have been breached without some negligence on the part of the stevedoring company (i.e., that there was no implied warranty covering liability without fault), we find it unnecessary to decide whether the district court was correct in holding that the presence of the express contract clause indemnifying for negligence precluded any implied warranty.

Judgment affirmed.

JERTBERG: Circuit Judge (dissenting)

I respectfully dissent. I do so only because of my view that the opinion of my brethren reaches a wrong result in an important and unsettled area of Admiralty law and one which will have far-reaching consequences.

The majority members of the panel conclude that the warranty of workmanlike service could not have been breached without some negligence on the part of the Stevedoring Company and found it unnecessary to decide whether the district court was correct in holding that the express contract clause indemnifying for negligence precluded any implied warranty.

Since I believe that the district court's dismissal of appellee's libel should be set aside and the cause remanded [fol. 55] to the district court with instructions to enter judgment in its favor against appellee for the amount of the indemnity sought, it becomes necessary for me to first consider the issue not passed upon in the majority opinion.

The Seattle hatch tent and tent tie-down rope involved were owned, supplied, rigged and exclusively controlled by appellee. The rope in question was permanently spliced to an eye in the tent. At the time of the accident, Griffith and his work partner had passed the rope through a deck fixture and back up and through the splice by which the rope was permanently attached to the tent. Griffith was pulling on the free end of the rope when it broke. It broke between

the point where Griffith was holding it and the point where it ran through the splice. The securing of the tent and the manner in which the tent and tent rope were being secured were entirely and exclusively within the supervision and control of appellee. When the rope broke it was being used for the purpose and in the manner for which it was supplied by appellee for use by its employees. The rope was a proper type of rope for use as a tent rope and there was no evidence that it was in an unsatisfactory condition. When the rope broke it was defective and unsatisfactory for the purpose for which it was intended.

The provisions of the stevedoring contract existing between appellant and appellee which are relevant and pertinent on this appeal provide:

> "(a) That the Stevedoring Company will act as stevedores, and that they will with all possible dispatch, load and/or discharge all cargoes of vessels owned, chartered, controlled, or managed by the Steamship Company at all Columbia and Willamette River ports as directed. And it is agreed that the Steamship Company will grant to the said Stevedoring Company the exclusive rights of handling all such cargoes as before mentioned under the terms of this agreement, and will pay for the work done by the Stevedoring Company in lawful money of the United States at the rates set forth in Schedule 'A,' attached hereto and made a part hereof;
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> "(b) That the Stevedoring Company will furnish all necessary labor and supervision and all ordinary gear for the performance of the services described in this [fol. 56] contract, including winch drivers and usual appliances used for stevedoring;
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> "(c) That the Steamship Company will furnish suitable booms, winches, blocks, and falls, steam and/or power and lights and will maintain the same in safe and efficient working conditions during the progress of the work; and
>
> "(d) That the Stevedoring Company will be responsible for damage to the ship and its equipment, and for

damage to cargo or loss of cargo overside, and for injury to or death of any person caused by its negligence * * *. The Steamship Company shall be responsible for injury to or death of any person or for any damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment."

I shall first consider appellee's contention that appellant's right to indemnity must be determined from the provisions of the written stevedoring contract. Appellee argues that since the contract provides that appellee shall be responsible "for injury to or death of any person caused by its negligence" and since the district court found that appellee was not negligent in furnishing the defective rope, the decree of the district court dismissing appellant's libel must be affirmed.

The district court found that "there is no evidence, outside of the written contract itself, as to the intent of the parties with respect to construction or interpretation of the stevedoring contract, or with respect to implied obligations under said contract." Thus, there is presented as a question of law whether under the contract the liability of appellee is limited to negligence and thereby negatives the existence of any obligation on the part of appellee to perform the stevedoring services in a workmanlike manner.

Was appellee under an obligation to render workmanlike service to appellant under the terms of the contract? It is to be noted that appellee agreed to act as stevedore and to load and discharge all cargoes of vessels owned, controlled, or managed by appellee at Columbia and Willamette River ports as directed. It is also to be noted that the contract does not contain an express agreement of indemnity [fol. 57] unless the last quoted provision of the contract, properly construed, limits the liability of appellee to its negligence and bars indemnity.

Since the decision of the Supreme Court in *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), absent an express agreement of indemnity, it has been settled law that an agreement between a ship-

owner and a stevedore to perform loading and discharging of cargo includes the implied-in-fact obligation to render workmanlike service. In *Ryan*, a stevedoring company agreed to perform stevedoring services for the shipowner. The agreement was evidenced by letters, but without a formal stevedoring contract or an express indemnity agreement. One of the members of the stevedoring company was injured during the unloading. A jury returned a verdict for the longshoreman against the shipowner. The shipowner had impleaded the stevedoring company claiming that it was entitled to full indemnity because the stevedoring company had negligently failed to stow the cargo in a safe and proper manner which negligence caused the shipowner to be liable to the longshoreman. The Court held that the shipowner was entitled to indemnity based on the stevedoring company's breach of its implied warranty of workmanlike service. In the course of its opinion, the Court stated, at p. 133:

> "The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken."

In *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563 (1958), the Supreme Court held that it was error to take a case from the jury on the question of indemnity where there was evidence tending to establish negligence on the part of the stevedoring company even though the shipowner had been held liable to the longshoreman only on the basis of negligence and not for unseaworthiness of the vessel. The stevedoring contract contained no express indemnity clause. The Supreme Court held that the stevedoring company's implied-in-fact contractual obligation to perform its duties with reasonable safety embraced not [fol. 58] only the handling of cargo but the use by the steve-

dore of ship's gear. In the course of its opinion, the Court stated, at p. 567:

> "We believe that respondent's [stevedoring company] contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in *Ryan*, but also to the use of equipment incidental thereto, such as the winch shelter involved here."

The implied-in-fact obligation of the stevedore to render service in a workmanlike manner is not based upon tort. As stated by the Supreme Court in *Ryan, supra*, at p. 133:

> "This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service."

In *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 (1959), the Supreme Court stated, at pp. 428-429:

> "A majority of the Court ruled in *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, that where a shipowner and stevedoring company entered into a service agreement, the former was entitled to indemnification for all damages it sustained as a result of the stevedoring company's breach of its warranty of workmanlike service. And see *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563. The facts here are different from those in the *Ryan* case, in that this vessel had been chartered by its owners to Ovido Compania Naviera S. A. Panama, which company entered into the service agree-

ment with this stevedoring company. The contract, however, mentioned the name of the vessel on which the work was to be done and contained an agreement on the part of the stevedoring company 'to faithfully furnish such stevedoring services.'

"We think this case is governed by the principle announced in the *Ryan* case. The warranty which a steve- [fol. 59] dore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the *Ryan* case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U.S., at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133-134. See *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050."

See also *Waterman Co.* v. *Dugan & McNamara*, 364 U.S. 421 (1960), wherein it was held that a stevedoring company was liable to the shipowner for indemnity even though there was no privity of contract between them and regardless of whether the injured longshoreman asserted his claim in an *in rem* or an *in personam* proceeding, since the stevedore's warranty of workmanlike service aboard the ship was for the benefit of the ship and its owner as well as the stevedore.

I am of the view that the provision of the stevedoring contract under which appellee agrees to be responsible "for injury to or death of any person caused by its negligence," which statement is simply an affirmation of an existing duty on the part of appellee, does not exclude from the stevedoring contract the implied-in-fact obligation to perform stevedoring services in a workmanlike manner, nor do I find any other provision of the contract or the contract as a whole to have any such effect. The obligation of the stevedore to indemnify the shipowner rests not

upon negligence but upon contract. The contract does not limit such obligation.

The final question is whether the implied-in-fact contractual obligation of appellee to render its services in a workmanlike manner embraces within its scope the duty to see that the equipment or gear required to be and furnished for the use of its own employees in the performance of its stevedoring services and exclusively used and controlled by them, must be seaworthy and fit for the use intended. Under the contract, appellee agreed to furnish [fol. 60] not only all necessary labor and supervision but also "all ordinary gear for the performance of the services described in this contract, including winch drivers and usual appliances used for stevedoring." There is no contention in the record that the Seattle hatch tent and tent tie-down rope were not ordinary gear which appellee was obligated to furnish under the terms of the contract.

I have found no Supreme Court decision which has occasion to pass upon the duty of a stevedoring company vis-a-vis the shipowner in respect to gear or equipment required to be and furnished by it in the performance of stevedoring services. I recognize that liability has been imposed upon a shipowner for breach of the implied warranty of seaworthiness in favor of a longshoreman whose injuries were caused aboard ship by defective gear or equipment belonging to and brought on the ship by his employer the stevedoring company. *Alaska Steamship Co., Inc.* v. *Petterson*, 347 U.S. 396 (1954). The right of the shipowner to recover indemnity from the stevedoring company was not involved in that case. I have found no intimation in the many decisions of the Supreme Court which I have reviewed that a shipowner would be denied the right to indemnity against the stevedoring company in instances where liability has been imposed on the shipowner either for damages to person or property caused solely by defective equipment furnished by the stevedoring company and exclusively used, controlled, and supervised by it. To impose liability on the shipowner in favor of a longshoreman and to deny recovery over against the stevedoring company under such circumstances, is inequitable. Since the loss must be borne by either one or the other, it is not

unfair that such loss be ultimately borne by the one best able to eliminate the hazard, to wit: the owner of the defective gear or equipment who supplied it and whose use and control over it was exclusive.

In my view, the Supreme Court decisions above cited do not exclude the existence of liability without fault as an element of the warranty of workmanlike service under the facts of this case.

In *Ryan, supra*, it is stated, at pp. 133-134:

> "It is petitioner's [stevedore's] warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product."

[fol. 61] This statement was reaffirmed by the Supreme Court in *Waterman, supra*, and in *Crumady, supra*.

The only case passing upon this point to which attention has been directed is *Booth Steamship Co.* v. *Meier & Oelhaf Co.*, 262 F.2d 310 (2nd Cir. 1958). The majority opinion states that *Booth* is indistinguishable in any significant way from the instant case but disagrees with the result reached in the *Booth* case. In *Booth*, a contractor undertook to overhaul the engines on Booth's vessel. One of the first steps in the execution of the work was the extraction of tight fitting cylinder liners from the engine block, and this was undertaken by means of extracting equipment consisting essentially of a rigid bar, or strongback, which was attached to the liner, and a jack, which was used to raise the liner by raising the strongback. Because the lifting arm of the jack was relatively short, it was necessary periodically to suspend the strongback holding the liner from a wire strap while the jack itself was lifted up. It was while the strongback was so suspended that the strap parted, allowing the strongback to fall and sever the thumb of the plaintiff, who was engaged in elevating the jack itself for further lifting.

The shipowner was held liable to the injured workman of the contractor for unseaworthiness. The shipowner sought indemnity from the contractor, but the district court dismissed the third-party claim of the shipowner

since there had been no proof that the contractor had been negligent in failing to discover the defect in the strap, which defect was latent and not discoverable on visual inspection.

In the course of its opinion, the court stated, at pp. 314-315:

> "The implied warranty of suitability for a particular use made by manufacturers and retailers is generally considered absolute, however, and is not avoided by the fact that in the exercise of ordinary care the defendant could not discover the injury-causing defect. See 1 Williston on Sales § 237 (Rev.Ed.1948 and Supp. 1958). It has repeatedly been suggested that the liabilities of suppliers should be co-extensive with those of the law of sales. See 4 Williston on Contracts § 1041 (1936 Ed.); 2 Harper and James, The Law of Torts, § 28.19 (1956); Prosser on Torts 496 (2d Ed.1955). In Shamrock Towing Co. v. Fitcher Steel Corp., 2 Cir., [fol. 62] 1946, 155 F.2d 69 we stated in dictum that the warranty of a supplier of marine equipment was as absolute as the maritime warranty of seaworthiness, see The H. A. Scandrett, 2 Cir., 1937, 87 F.2d 708; that it therefore made no difference whether a defect was discoverable; that as a result both warranties would be breached in the event that the chattel supplied proved inadequate to the purpose for which it was supplied under normal conditions of use. We see no reason to alter that opinion.
>
> "Like the manufacturer or retailer the supplier profits from the bailment or lease of his equipment. Although he is unable to prevent defects arising in the course of manufacture, his expert knowledge of the characteristics of the equipment in use should enable him to detect them more readily than the user. It is therefore not less reasonable as an incident of his contract to charge him with the duty of making tests, the omission of which would not constitute negligence, than it is to charge the manufacturer or retailer with a similar responsibility. We think that this is particularly true when the chattel is supplied, as it pre-

sumably was here, in the partial fulfillment of a general undertaking to make repairs. In such circumstances the hirer defers to the special qualifications of the contractor in both the selection and use of the equipment. Relying on the supplier's control of the work and with confidence in the supplier's expert knowledge and competence, he makes at most only a routine inspection of the equipment employed. To say that the supplier warrants the equipment merely confirms the customary reliance which flows from such a relationship and which affords an appropriate remedy.

"Applying general principles to the facts of this case, we find that the defect which caused the plaintiff's injury was not detectable by the ordinary visual inspection which the vessel's officers on the scene may be expected to make. Such latent defects in wire as are undetectable on visual inspection may result from improper manufacture or from fatigue resulting from use over a period of time. They may perhaps be discovered by subjecting the equipment to appropriate tests with safety factors in excess of the contemplated undertaking. Furthermore, it is the supplier and not [fol. 63] the shipowner who knows the actual history of prior use of the equipment. He alone is in the position to establish such retirement schedules or periodic retests as will best prevent the development of visually undetectable flaws.

"Accordingly we hold that if the contractor undertook to do the work of repair of the vessel's engines, and if he supplied the equipment which failed in the course of the use for which it was supplied, then the failure constituted a breach of the contractor's implied warranty of workmanlike service and rendered him liable to indemnify the owner for damages paid to the contractor's employee on account of injuries resulting directly from the failure."

I find no significant fact which distinguishes the *Booth* case from the instant case. Much that is said in *Booth* can be applied with equal force to this case. I see no policy considerations in Maritime law and no injustice in

requiring a stevedore to indemnify a shipowner from a liability visited upon the shipowner solely through failure on the part of the stevedore to furnish, in connection with the performance of a stevedoring contract, equipment that is fit for the use intended.

It is to be noted that the case presented to us is that of the shipowner vis-a-vis the stevedoring company. We are not concerned with the injured longshoreman who has received compensation for his injuries, nor policy considerations which have led to a tender solicitude on the part of the Admiralty Court for injured seamen and longshoremen. The contest here is between equals and no thought should be given to which of them is more able to bear the burden.

I would set aside the decree of the district court dismissing appellee's libel and would remand the cause to the district court with instructions to enter judgment in its favor against appellee for the amount of the indemnity sought.

[File endorsement omitted]

[fol. 64]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,616

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, Appellant,

vs.

OREGON STEVEDORING COMPANY, INC., Appellee.

JUDGMENT—Filed and Entered October 25, 1962

Appeal from the United States District Court for the District of Oregon.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this court that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[fol. 65]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Barnes, Hamlin and Jertberg, Circuit Judges.

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—December 5, 1962

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed November 23, 1962, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

Judge Jertberg dissenting, would grant the petition for rehearing.

[fol. 66] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 67]

SUPREME COURT OF THE UNITED STATES

No. 876—October Term, 1962

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, Petitioner,

vs.

OREGON STEVEDORING COMPANY, INC.

ORDER ALLOWING CERTIORARI—April 15, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.